No. 14,500

IN THE

United States Court of Appeals

For the Ninth Circuit

In the Matter of the Application of L. B. & W. 4217; and the Application of JONES, WILSON AND ERVIN, d/b/a "THE CLUB" for Beverage Dispensary License.

BRIEF OF JOHN E. MANDERS, AMICUS CURIAE.

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The permission of the Court granting leave to this *amicus curiae* to file this brief is appreciated.

The attempted delegation of power by the Territorial legislature to the Courts of the District of Alaska is nothing more or less than the child of a sterile mother.

THE QUESTION PRESENTED IN THIS BRIEF IS: INVALIDITY OF SECTIONS 35-4-11 TO 35-4-23, INCLUSIVE, ACLA 1949, AS AMENDED (ALASKA LIQUOR LAW), IN IMPOSING NON-JUDICIAL FUNCTIONS ON THE DISTRICT COURT FOR THE DISTRICT OF ALASKA.

It is the position of *amicus curiae* that the District Court for the District of Alaska is without power or

authority to issue any liquor license pursuant to the Alaska Liquor Law, by reason of the fact that the Territorial legislature has, by enactment of the Alaska Liquor Law, imposed upon the District Court *ministerial or administrative functions and the same are non-judicial in nature.*

It is not amiss to call to the Court's attention certain relevant and material provisions of acts of Congress of the United States as well as acts of the Territory of Alaska Legislature.

Licenses to dispense liquor in the Territory of Alaska can only be issued by an order of the District Court or Judge thereof and not otherwise.

Sec. 35-4-12 ACLA 1949, provides:

> "LICENSES: ISSUANCE: RECORD. The licenses provided for in this Act shall be issued by the Clerk of the District Court or any subdivision thereof in compliance with the order of the Court or Judge thereof duly made and entered; and the Clerk of the Court shall keep a full record of all applications for licenses and of all recommendations for and remonstrances against the granting of licenses and of the action of the Court thereon."

Title 48 U.S.C.A. section 24, provides:

> "LIMITATIONS ON AUTHORITY TO ALTER, AMEND, MODIFY OR REPEAL EXISTING LAWS: OTHER OR ADDITIONAL TAXES OR LICENSES. The authority granted to the legislature by section 23 of this title (§2-1-1 herein) to alter, amend, modify, and

repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal, or other general laws of the United States or to the game-fish and fur seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to sections 41, 47, 161 to 169, and 322 to 325 of this chapter. This provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses."

Section 4-2-5 ACLA 1949, provides:

"ACTS OF LEGISLATURE IN CONFLICT WITH CERTAIN FEDERAL ACTS VOID. Except as otherwise provided by law all acts and parts of acts passed by any Territorial legislature subsequent to July 30, 1886, in conflict with the provisions of sections 1473, 1475, 1478, and 1479 (§§ 4-2-5, 4-3-5, 12-1-1, 12-1-3 herein) of this title shall be null and void."

Section 4-2-6 ACLA 1949, provides:

"PROHIBITION AGAINST LAWS IMPAIRING JURISDICTION OR AUTHORITY OF DISTRICT COURT JUDGES OR OFFICERS. The legislature shall pass no law depriving the judges and officers of the district court of Alaska of any authority, jurisdiction, or function exercised by like judges or officers of district courts of the United States. (48 U.S.C.A. §80.)"

By act of Congress a District Court has been established for the Territory of Alaska. It is vested with

the jurisdiction of District Courts of the United States and with general jurisdiction in civil, criminal, equity and admiralty cases. But it is not a District Court of the United States within the meaning of acts of Congress relating to such Courts. (54 Am. Jur., §339, p. 963.)

Section 4-2-7 ACLA 1949, provides:

> "ENFORCEMENT OF LAWS BY COURTS: POWER OF LEGISLATURE TO IMPOSE ADDITIONAL DUTIES ON FEDERAL OFFICERS. Nothing in sections 21 to 24, 44, 45, 67 to 73, 74 to 90 of this title shall be so construed as to prevent the courts of Alaska from enforcing within their respective jurisdictions all laws passed by the legislature *within the power conferred upon it,* the same as if such laws were passed by Congress, nor to prevent the legislature passing laws imposing additional duties, not inconsistent with the present duties of their respective offices, upon the governor, marshals, deputy marshals, clerks of the district courts, and United States commissioners acting as justices of the peace, judges of probate courts, recorders and coroners, and providing the necessary expenses of performing such duties. (48 USC §91.)" (Italics ours.)

No mention is made in the above section of District Courts or Judges thereof.

Section 4-2-9 ACLA 1949, provides:

> "RATIFICATION OF ACTS OF FIRST LEGISLATURE IMPOSING DUTIES ON FEDERAL OFFICERS. All acts of the First Legislature of the Territory of Alaska, contained

> in Alaska Session Laws of 1913, imposing additional duties upon the Governor, Secretary of the Territory, United States Marshals, Deputy United States Marshals, Clerks of the Courts, United States Commissioners, United States District Attorneys, and other officers, be, and the same hereby are, ratified and confirmed in all particulars except as the same may have been amended by Acts of the present and Second Session of Alaska Legislature.''

No mention is made in the above section of District Courts or Judges thereof.

As set forth in Section 35-4-12, ACLA, 1949, as amended, the only authority for the Clerk of the District Court to issue a liquor license is upon the *order of the Court or judge* duly made and entered. The Clerk has no authority to issue any licenses *except upon such order. It is the Court alone or Judge* who determines whether a liquor license shall or shall not be issued by the Clerk. (Italics ours.)

Congress has not delegated to the Territorial legislature the power to impose duties on the Court which are not of a judicial nature, and not having so delegated its (Congress') power to the Territorial legislature to impose such duties, from what source did the legislature obtain authority imposing such duties? WHEN DID THE AGENT (TERRITORIAL LEGISLATURE OF ALASKA) CREATED BY CONGRESS HAVE GREATER POWER THAN ITS PRINCIPAL (CONGRESS OF THE UNITED STATES), ITS CREATOR?

THE FORM AND NATURE OF TERRITORIAL GOVERNMENT AND DIVISION OF POWERS IS SET FORTH IN 62 C. J. 797, §17.

"No special form of government is necessarily a feature of an organized territory, and the determination as to the form of the government to be established in any particular territory is within the discretion of congress. As a general rule the governments which have been established have been representative, at least in respect of the legislative body, and have consisted of the three departments, executive, legislative, and judicial, generally recognized as typical of the American system of government. Rules as to the distribution of powers among the three departments of government, and as to the independence of each, similar to those applicable to the federal and state governments, have been recognized or applied where the operation of the government of the territories has been involved even though the organic act contains no general distribution clause. Thus, while the three departments are interdependent, in the sense that each is unable to perform its functions fully and adequately without the others, in the main each department is independent and not subject to the direct control of another; the powers of the several departments are separate and distinct, and neither department may encroach on another in respect of the latter's exercise of powers duly conferred, as, for example, by an attempt to exercise any of the powers conferred by the organic act on either of the others even though the organic act contains no explicit prohibition in this regard. Courts will, so far as is within their power, protect each of the departments from encroachment. The question as to which department has power in a

particular matter depends in general on the provisions of the organic law. Functions of each department may be exercised only in the manner prescribed by applicable acts of Congress or by laws of the local legislative body in conformity with such acts of Congress."

In the famous case of *Springer v. Government of the Philippine Islands,* 277 U.S. 189, 72 Law. Ed. 845, at page 849, Mr. Justice Sutherland, in delivering the opinion of the Court stated:

"Thus the Organic Act, following the rule established by the American constitutions, both state and Federal, divides the government into three separate departments—the legislative, executive and judicial. Some of our state constitutions expressly provide in one form or another that the legislative, executive and judicial powers of the governments shall be forever separate and distinct from each other. Other constitutions, including that of the United States, do not contain such an express provision. But it is implicit in all, as a conclusion logically following from the separation of the several departments. See *Kilbourn v. Thompson,* 103 U.S. 168, 190, 191, 26 L.ed. 377, 386, 387. And this separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital—not merely a matter of governmental mechanism. That the principle is implicit in the Philippine Organic Act does not admit of doubt. See Abueva v. Wood, 45 Philippine, 612, 622, 628 et seq.

"It may be stated then, as a general rule inherent in the American constitutional system,

that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power. The existence in the various constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department emphasizes, rather than casts doubt upon, the general inviolate character of this basic rule."

GOVERNMENT OF TERRITORIES—54 AM. JUR. §28, pp. 542, 543.

"* * * The Constitution confers on Congress the power to govern and control territory owned by the United States and to make regulations in regard thereto. In reference to territories Congress occupies a dual position, one as Congress of the United States, limited by the Constitution, and the other as a local legislature to which many constitutional limitations on Congress do not apply; it may in general do for the territories what the people, under the Constitution of the United States, may do for the state. The term 'regulations' as used in Article 4, § 3, is construed as meaning 'laws'. The term 'territory' as used in this connection is merely descriptive of one kind of property, and is equivalent to the word 'lands'. And Congress has the same power over it as any other property belonging to the United States; and this power is vested in Congress without limitation, and has been consid-

ered the foundation upon which the territorial governments rest. * * *''

POWER OF FEDERAL GOVERNMENT OVER TERRITORIES—49 AM. JUR., §113, p. 326.

"The people of the United States, as sovereign owners of the national territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself. In the fullest sense the United States possess sovereignty over the territories of the United States so long as they exist under territorial government. The convention which framed the Constitution of the United States, in view of the territory already possessed and the possibility of acquiring more, inserted in that instrument in Art. 4, §3, a grant of express power to Congress 'to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' Whether the provisions of a particular act are applicable to a given territory depends upon the character and aim of the act.

"In reference to the territories, Congress occupies a dual position, one as the Congress of the United States limited by the Constitution, and the other as a local legislature to which many

of the constitutional limitations on Congress do not apply. The territories are merely political subdivisions of the outlying dominion of the United States. They bear much the same relation to the general government that counties do to the states, and Congress may legislate for them as states do for their respective municipal organizations. The organic law of a territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme and for the purposes of this department of its governmental authority has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution.

"Territory when acquired by treaty becomes the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations may see fit to accept relating to the rights of the people then inhabiting that territory. Having rightfully acquired the territory, the United States Government is the only one which can impose laws on it, and its sovereignty over it is complete."

ORGANIZATIONS AND OPERATION OF TERRITORY SOLELY IN THE HANDS OF CONGRESS—49 AM. JUR., §127, p. 336.

"The organization of a territory is solely in the hands of Congress. It may determine the form of the local government in a particular territory as well as the qualifications of the officers

who shall administer it. In ordaining government for the territories and the people who inhabit them, all the discretion which belongs to the legislative power is vested in Congress; and that extends, beyond all controversy, to determining by law from time to time the form of the local government in a particular territory and the qualifications of those who shall administer it. The form of government for the territories which Congress shall establish is not prescribed, and need not necessarily be the same in all territories. The form generally adopted is that of a quasi-state government, with executive, legislative, and judicial officers, and a legislature endowed with the power of local taxation and local expenditures; but Congress is not limited to that form."

VESTING DISCRETIONARY POWER IN JUDICIARY—11 AM. JUR., §228, p. 942.

"There are certain apparent exceptions to the general rule forbidding the delegation of legislative authority to the courts in cases where discretion is conferred upon the courts. It is clear, however, that when the courts are said to exercise a discretion, it must be a mere legal discretion which is exercised in discerning the course prescribed by law, and which, when discerned, it is the duty of the court to follow. In such instances, the exercise of judicial discretion by the courts is not an attempt to use legislative power or to prescribe and create a law, but is an instance of the administration of justice and the application of existing laws to the facts of par-

ticular cases. Thus, the principle as to the separation of powers of government is not transgressed by vesting in the courts discretion as to the granting of licenses or the length of sentence or amount of fine between designated limits in sentencing persons convicted of a crime. * * *''

LEGISLATIVE INTERFERENCE WITH JUDICIARY—
11 AM. JUR., §206, p. 908.

''The legislature cannot ordinarily diminish, enlarge, or interfere with the jurisdiction of a court as defined by the Constitution. It may, however, create courts not mentioned in the Constitution, but it may not confer upon them powers which could not have been conferred upon the courts already existing.

''The rule is well settled that the judicial power cannot be taken away by legislative action. Any legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional. The legislature is therefore not permitted to interfere with the courts in the performance of their duties, as, for example, by declaring the forfeiture of the salary of a judge for a failure to perform his duties. It has no power to direct the judiciary in the interpretation of existing statutes. It cannot by statute interfere with the power vested in the courts by the state Constitution to issue writs of mandamus to enforce the performance of an official duty. Similarly, a statute forbidding the courts to direct a verdict is unconstitutional as invalidly attempting to limit the constitutional powers vested in the judiciary.

"The general rule is subject to some modification. The fact that the courts have all the inherent and implied powers necessary to function properly and effectively does not mean that they are wholly independent of the legislature, which may put reasonable restrictions upon constitutional functions of the courts, provided that such restrictions do not defeat or materially impair the exercise of those functions. Thus, the legislature may, within proper bounds, prescribe rules of practice and procedure for the exercise of jurisdiction. Moreover, the suspension of a possessory remedy is not an impairment of the constitutional jurisdiction of a court.

"Legislative interference with the courts by attempting to delegate to them legislative powers or confer upon them nonjudicial functions is elsewhere considered."

DELEGATION TO, OR CONFERRING LEGISLATIVE POWER UPON, JUDICIARY—11 AM. JUR., §225 p. 937.

"One important application of the principle as to the separation of governmental powers and their allotment to the three departments of government consists in the rule prohibiting the vesting of legislative power in the judiciary. The legislature cannot delegate or confer legislative power on the courts or impose legislative duties upon them, because such duties are not judicial in nature. Well settled as is the general rule, there is a wide variance of conclusions in those cases in which it has been sought to be

applied. Not only do the constitutional provisions vary as to the powers which may be imposed upon the courts or which may be delegated to them in the different states, but the courts themselves have taken inconsistent positions on the questions of what constitutes legislative power and what constitutes judicial function. Those cases dealing with laws attempting to vest in the courts a power of appointment graphically illustrate the diversity of views existent. It has usually been held that where a statute attempts to vest powers in the judiciary to appoint to office certain administrative or subordinate officers, or officers who assist in carrying out court functions, no invalid delegation of legislative authority to the judiciary has been made and there is no usurpation of legislative power by the court. In other cases it has been held that statutes imposing the power of appointment on judges are invalid as attempting to impose upon the courts a nonjudicial function. These cases generally involved the attempted appointment of such officers as waterworks trustees, surveyors, and other officers whose duties were solely ministerial and not connected with the exercise of judicial functions."

DISTRIBUTION OF POWERS OF GOVERNMENT—AS BETWEEN THE SEVERAL DEPARTMENTS—11 AM. JUR., §180, p. 876.

"One of the fundamental principles of the American Constitutional system is that the governmental powers are divided among the three departments of government, the legislative, execu-

tive and judicial, and that each of these is separate from the others. The principle as to the separation of the powers of governmental operates in a broad manner to confine legislative powers to the legislature, executive powers to the executive department, and those which are judicial in character to the judiciary. It has been said that the object of the Federal Constitution was to establish three great departments of government: The legislative, the executive, and the judicial departments. The first was to pass the laws, the second, to approve and execute them, and the third, to expound and enforce them."

IMPOSING NONJUDICIAL FUNCTIONS ON COURTS—14 AM. JUR., §20, p. 258.

"One application of the general principle as to the separation of the powers of government is the rule which has itself been described by some authorities as a rudimentary principle of constitutional law—namely, that on judges as such no functions can be imposed except those of a judicial nature. It has been said that the policy and intent of the constitutional system is that the courts and judges not only shall not be required, but shall not be permitted, to exercise any power or to perform any trust or to assume any duty not pertaining to, or connected with, the administering of the judicial function, and that the exercise of any power or trust or the assumption of any public duty other than such as pertains to the exercise of the judicial function is not only without constitutional warrant, but is against the

constitutional mandate in respect of the powers they are to exercise and the character of the duties they are to discharge. Under these principles, functions which are essentially executive and administrative in character cannot be delegated to the judiciary. An act of the legislature delegating executive or legislative powers to courts has been viewed as unconstitutional.

"The full force of this principle denying the right of the legislature to impose nonjudicial functions on the courts is not recognized in many jurisdictions. In many states nonjudicial administrative duties have been continually placed upon the judges, and the power of the legislature to do this has been upheld. According to some authorities, municipal or police courts are not repositories of the judicial power referred to in the Constitution, and the legislature has therefore the right to impose upon the judge of such a court powers and duties of a nonjudicial character. Where a Constitution has placed in the legislature the power to regulate the mode of appointing officers not otherwise provided for, the authority of the legislature to confer upon judges and courts the power to appoint inferior officers whose duties have no connection with the functions of courts has frequently been recognized."

In *City of Zanesville v. Zanesville Tel. & Tel. Co.*, 59 N.E. 781 (Ohio), at page 782, it is stated:

"* * * It is a sound proposition that the distribution of the powers of the state by the constitution to the legislative, executive and judicial departments, operates, by implication, as an inhibition against the imposition upon either of those powers

which strictly belong to one of the other departments. * * *"

Although not expressly provided for in the Organic Act of Alaska, the doctrine of separation of powers is implicit in the organization of governmental powers into the three traditional departments. If the doctrine is accorded full recognition, the territorial legislature is inhibited from conferring a nonjudicial function on the District Court of Alaska or the judges thereof. This must be so pursuant to the provisions of 48 USCA 91, which provides:

"Nothing in sections 21-24, 44, 45, 67-73, 74-90 and 145 of this title shall be so construed as to prevent * * * the legislature passing laws imposing additional duties, not inconsistent with the present duties of their respective offices, upon the governor, marshals, deputy marshals, clerks of the district courts, and United States Commissions * * *"

Again it is to be noted that courts, or the judges thereof, are not mentioned in that act.

CIVIL GOVERNMENT OF ALASKA.

It is the wish of *amicus curiae* to call to the Court's attention the language as to the civilian government of Alaska, as set forth in the case of

Abbate v. United States, 270 F. 735 at page 738:

"The territory ceded to the United States by Russia by the Treaty of March 30, 1867, 15 Stat. 539, remained until 1884 unorganized, subject to

provisions of Act July 27, 1868, c 273, 15 Stat. 240, and subsequent acts, most of which were incorporated into R.S. §§ 1954-1976. It was constituted a civil and judicial district, and a civil government therefor was established by Act May 17, 1884, c 53, 23 Stat. 24, which provided for a Governor and other officers and for a District Court for said district. A Criminal Code and Code of Criminal Procedure for the district were enacted by Act March 3, 1899, c. 429, 30 Stat. 1253. Further provisions for a civil government, including a Code of Civil Procedure and a Civil Code were made by the Carter Act of June 6, 1900, c. 786, 31 Stat. 321. And it was constituted the territory of Alaska, and further provisions for its government, including the creation of a legislative assembly, were made by Act Aug. 24, 1912, c. 387, 37 Stat. 512 (U.S. Comp. Stats. § 3528 et seq.). Section 3530 of those Statutes, relating to the territory of Alaska, is as follows:

> 'The Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the Legislature,'

with certain exceptions and provisions not applicable to the present case.''

NON-JUDICIAL FUNCTIONS.

In *Norwalk Street R. Co.'s Appeal,* 69 Conn. 576, 39 L.R.A. 794, quoting from the syllabus:

"The incapacity of the legislature to execute a power which is essentially and merely a judicial power, and of the judiciary to execute a power which is essentially and merely a legislative power, as well as the limitation of the meaning of legislative power by force of certain primary principles of government fairly embodied in the Constitution, and by the necessities involved in the separation and independence of distinct departments of government, is fundamental to the very existence of constitutional government as established in the United States.

"A superior court or judge thereof cannot validly exercise a power which is not 'a judicial power' within the meaning of the Constitution.

"An original application to a superior court or judge thereof for the approval and adoption or modification of a plan for the location and construction of a street railway, including the determination of the streets to be occupied and the location as to grade and center line of the street, as well as changes to be made in the street or kind and quality of track to be used, the motive power and method of applying it, does not call for the exercise of a judicial power within the meaning of the Constitution, although the application is called an appeal and is made after the refusal or neglect of local authorities to give notice of their decision on the plan within sixty days after it is presented to them; and this is by statute deemed to be a refusal on their part to approve and accept the plan."

And further, in that case, it is said at page 799:

"* * * The Supreme Court of the United States has uniformly held that a law conferring on the courts a power which is not a judicial power within the meaning of the Constitution, is unconstitutional, and that such power cannot be lawfully exercised by the courts."

And further, in the case of *Wayman v. Southard,* 23 U.S. 10, 6 L. ed. 253 at 263, the Great Chief Justice is quoted as stating:

"The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes, the law."

In the case of *McCrea v. Roberts,* Judge (Md.) 43 A. 39, quoting the syllabus:

"Mandamus does not lie to compel a circuit judge to grant an application for a liquor license, where he, after a hearing on the merits, has dismissed the application, though the dismissal was erroneous, since the writ is not awarded to control the discretion of courts acting within their jurisdiction, or to reverse a decision when made.

"Acts 1894, c. 6, § 7, providing that, where objections are filed to an application for a liquor license in Carroll county, both the application and objections shall be referred to the circuit judge, who shall, on notice, determine whether the license applied for shall be issued or not, imposes a judicial duty on the circuit judge, and hence is not repugnant to Bill of Rights, art. 8, providing that the legislative, executive and judicial powers of the government shall forever be separate and dis-

tinct and that no person exercising the functions of one of said departments shall discharge the duties of any other, and article 33, providing that no judge shall hold any other office or political trust."

The distinction between this case and the situation in the Territory of Alaska is that in this case the Clerk could have issued the license in the first instance unless a protest or remonstrance was filed. *In Alaska the Clerk is not vested with any authority to issue a license except when the Court or Judge enters an order for the issuance of such license.*

In *Cromwell v. Jackson* (Md.) 52 A. 2d 79, quoting from the syllabus:

"Intoxicating liquors:

The sale of alcoholic beverages is a privilege and not a right.

Licenses to sell alcoholic beverages are not regarded as property or as conferring any property rights.

The state can control, regulate and prohibit the sale of intoxicating beverages, and licenses for sale of liquor are granted by state in exercise of its police power.

License for sale of alcoholic beverages is a permit granted or withheld at the pleasure of the state and at any time the state may annul or modify or prescribe its conditions.

The legislature has the power to limit the number of licenses for sale of alcoholic beverages and the location of establishments where such beverages may be sold.

In construing a statute all presumptions are in favor of the act and it should not be stricken down as void unless it plainly violates a constitutional provision.

A reasonable doubt in favor of a statute is sufficient to sustain it.

Courts can be warranted only in a clear case in declaring an act unconstitutional.

Where Court of Appeals is of opinion that legislature has exceeded its authority in placing non-judicial function on court, Court of Appeals will not hesitate in declaring the act void.

Statute authorizing judges of Circuit Court for Allegany County to approve license for sale of alcoholic beverages if court is of opinion that applicant is fit person or place proper one with reference to public peace and general welfare of neighborhood or to character of inhabitants, due regard being given to number of licenses issued for neighborhood, as well as all specific restrictions and conditions set forth in act, imposes duties on judges which are quasi-legislative and non-judicial and therefore statute as a whole is unconstitutional, notwithstanding the severability clause. Pub. Loc. Laws 1930, art. 1 §§ 301, 301A, 301B, 304, 305 as added by Laws 1933, Sp. Sess. c. 5; Declaration of Rights, art. 8.

Where statute was unconstitutional, clause thereof repealing prior law was void.

The old saloon law for Allegany County and amendments thereto were so repugnant to and inconsistent with the new statewide Alcoholic Beverages Act that the old saloon law and amendments thereto were repealed by the new act. Laws

1894, c. 140; Code Supp. 1943, art. 2B, § 3, subds. 1(a), 2(a), § 5, subd. F, § 6, subds. E, F."

This case is extremely instructive. However, the case comprises 16 pages and would be too long to quote at length. However, all of the various cases which have arisen in Maryland on the question of non-judicial functions are set forth and the distinctive features of each case gone into, including the case of *McCrea v. Roberts; Close v. Southern Maryland Agr. Association; Appeal of Norwalk Street R. Co.,* supra.

In the case of *Close v. Southern Maryland Agricultural Ass'n,* 108 A. 209, quoting from the syllabus:

"Appeal from an order of the circuit court granting an agricultural association a license to make and permit betting, pool selling, and bookmaking on the result of horse races on its grounds pursuant to Code (vol. 3) art. 27, §§ 218-221, held not open to dismissal as involving only a moot question after expiration of the time for which the license was issued.

"If action of circuit court, in granting agricultural association license to make and permit betting, pool selling, and bookmaking on the result of horse races, was prohibited by Declaration of Rights, art. 8, because not a judicial act, the circuit court had no jurisdiction to grant the license, and the Court of Appeals can entertain an appeal from its action, having jurisdiction to review the circuit court acting without jurisdiction either on appeal, writ of error, or of its own motion, even though the question of jurisdiction was not raised

below, as Code, art. 5 § 9, does not apply to such question.

"Under Declaration of Rights, art. 8, it is not left to the discretion of judicial officers whether they will or will not perform non-judicial duties, but they are not permitted to do so.

"Code (vol. 3) art. 27, §§ 218-221, authorizing the licensing of betting and bookmaking at and on horse races within the grounds of an agricultural association, etc., on license by the circuit court, held violative of Declaration of Rights, art. 8, as involving the exercise of non-judicial functions, ministerial and legislative, by the circuit court, particularly in view of section 217."

Judge Jones in the case of *Board of Superintendents, etc. v. Todd,* 54 A. 963, at page 964 stated:

" 'The inquiry as to this is whether it is within the constitutional power of the Legislature to impose upon the judiciary or invest them with, a function of his character, and whether the judiciary in the attempt to discharge such a function are not acting without constitutional warrant.'

"He referred to the case of State v. Chase, 5 Har. & J. 297, where Judge Buchanan said:

" 'New judicial duties may often be unnecessarily imposed, and services, not of a judicial nature, may sometimes be required. In the latter case, a judge is under no legal obligation to perform them'—to which Judge Jones added, 'which was to say that the opinion of the court was that duties, "not of a judicial nature," could not legally and constitutionally be imposed upon the courts or the judges.'

"After referring to the fact that in the Constitutions of 1851, 1864, and 1867 there had been added to the provisions of the Declaration of Rights in the Constitution of 1776, which was in force when State v. Chase was decided, the last clause of what is now article 8, and that there was the further declaration (article 33) that 'no judge shall hold any other office, civil or military or political trust, or employment of any kind whatsoever, under the constitution or laws of this state, or of the United States, or any of them,' the court used this emphatic language:

" 'It would seem thus to be made evident in our fundamental law that the policy and intent of that law is that the courts and judges provided for in our system shall not only not be required *but shall not be permitted* (italics ours) to exercise any power or to perform any trust or to assume any duty not pertaining to or connected with the administering of the judicial function; and that the exercise of any power or trust or the assumption of any public duty other than such as pertain to the exercise of the judicial function is not only without constitutional warrant but *against the constitutional mandate* in respect to the powers they are to exercise and the character of duties they are to discharge.'

"The court further said:

" 'That counting the names upon a petition, ascertaining whether the names appended thereto are those of voters at the last election for Governor, and ordering an election, is not a judicial function, is a proposition that would seem to be too plain to need argument to enforce it. The order, which by the statute here under consider-

ation, the court is required to pass, is not to be the result of any judicial inquiry.' "

In the case of *State v. Huber* (West Virginia), 40 S.E. 2d 11, 168 A.L.R. 808, quoting the syllabus:

"A statute attempting to confer original jurisdiction upon courts of record, concurrently with jurisdiction conferred upon a designated administrative agency, to entertain complaints relating to alleged violations of a statute regulating the sale of nonintoxicating beer, defining the procedure to be followed on such a complaint, and authorizing the court to suspend or revoke licenses issued by the administrative agency for the sale or distribution of such beverages, is an unconstitutional invasion of an exclusive function of the legislative departments of the government and confers no jurisdiction upon the court to entertain complaints in such cases."

The Court in that case, at page 817 stated:

"* * * Unquestionably, the power of regulation of public utilities, the licensing of businesses of all kinds, the regulation of such businesses, the general control thereof, including the power of revoking licenses or permits issued in connection therewith, is a legislative power. This power is subject to control by the courts only where, in the exercise thereof, there has been a violation of some State or Federal constitutional provision, limiting the Legislature in its right to perform certain acts in connection with the power it assumes to exercise. * * *"

The Court further stated at page 818:

"* * * It is the power which a regularly constituted court exercises in matters which are brought before it, in the manner prescribed by statute, or established rules of practice of courts, and which matters do not come within the powers granted to the executive, or vested in the legislative department of the Government. * * *"

In this case the Court, at page 819 stated:

"The regulation of the manufacture, distribution and sale of nonintoxicating beer is clearly within the power of the Legislature, under the police power of the State. Ninebaugh v. James, 119 W Va 162, 192 SE 177, 112 ALR 59. Connected with the power to regulate, and as a necessary adjunct thereto, is the power to revoke licenses, which may be used in connection therewith. Without this power there could be no effective regulation. This being true, what place has the judicial department in that regulation, save and except to see that it is exercised in conformity with the general laws guaranteeing the citizens due process of law in matters affecting their rights, whether they be personal, or connected with their property? If the regulation of the sale of nonintoxicating beer is a legislative function, Article V of our Constitution expressly prohibits the exercise of that power by the courts."

At page 821-822 the Court further states:

"We are mildly criticized for expressing the view that a strict rule should be applied in the

application of Article V of our Constitution, and our attention is called to cases in which this Court has stated that abstract, analytical lines of separation of powers have not and cannot be drawn. This is freely conceded. There is, necessarily, some mingling and overlapping of powers between the three separate departments of our State Government. These are incidental, and probably cannot be avoided. But if we sustain the present law, conferring jurisdiction on courts of record to entertain proceedings to revoke licenses to sell nonintoxicating beer, it will, in principle, amount to total destruction of the theory of separation of power, intended to be forever secured by Article V of our Constitution. We deem it our duty to attempt to enforce the true meaning, intent and purpose of Article V, rather than to encourage departure therefrom. * * *"

It is further stated by the Court at page 825:

"* * * But consideration of high public policy, and the plain terms of our Constitution, impel us to the conclusion that the licensing and regulation of the sale and distribution of nonintoxicating beer is the exclusive function of the legislative department of our Government, under the police power of the State; is not a judicial function; and cannot be made the subject of the exercise of judicial power, save only in cases where in the exercise by the Legislature of its power in the premises, there is a violation of the Constitution, or the laws of the State, or some arbitrary or fraudulent exercise of that power, or where its exercise is without excuse or without evidence, which in itself would be an arbitrary exercise of

power. Then and then only may judicial power, be invoked. * * *''

The foregoing case is, in the opinion of the writer, determinative of the question presented and by reason of the length of the opinion it is most respectfully requested that the Court examine this case with particularity.

SUA SPONTE.

It would appear to the writer of this brief that when it appears to a Court that a nonjudicial function is imposed upon that Court, to be exercised by that Court, that the Court should *sua sponte* either refuse to act or hold the offending act invalid.

It is common knowledge the Courts of Alaska, the judges and clerks thereof and attaches, as well as the general public and the attorneys that at least two months of each and every year is devoted by the Courts, the judges and the respective clerks' offices in processing and hearings of applications for liquor licenses, in some instances hearings having consumed as much as seventeen full Court days in the Third Judicial Division, and a like situation exists in the other judicial divisions of this Territory. All of this without taking into consideration the waste of time, effort and money of applicants for liquor licenses, as well as witnesses in the hearing of applications therefor, the time of counsel consumed, as well as the court's, the judge's and the clerical assistance of the respective clerks' offices.

The present condition in this Territory under which liquor licenses are granted should be brought to an end and the administration and regulation thereof should be placed where it belongs, namely, in a board or commission to be provided for by the legislature for that purpose and *not* in the Courts.

Amicus curiae respectfully submits that the Alaska Liquor Law is invalid by reason of imposing non-judicial functions on the District Court of Alaska and the judges thereof, which nonjudicial function is the heart of the act, and without such heart being able to function the entire body of the act must fall.

Dated, Anchorage, Alaska,
November 29, 1955.

Respectfully submitted,
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Amicus Curiae.